SENTENCES THAT FIT
FAMM
JUSTICE THAT WORKS

March 19, 2012

Hon. Patti B. Saris, Chair
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Re: Request for Public Comment, 2012 Proposed Amendments to the Sentencing Guidelines, Policy Statements and Official Commentary.

Dear Judge Saris:

We submit these comments on the various proposals and issues for comment on behalf of FAMM. Our comments cover proposed amendments to and issues for comment about the Dodd-Frank, Drug, Multiple Counts and Rehabilitation proposed amendments.

1. Proposed Amendment: Dodd-Frank/Fraud.

We commend the Commission for considering amending the guidelines to soften the impact of the loss and victims tables in cases under § 2B1.1 and for seeking comment on whether mitigating factors in cases involving mortgage and/or financial fraud are reflected in the guidelines. The Commission observed a marked rate of government and non-government sponsored variances from sentences at the high end that are driven by high loss, many victims or combinations of the two. The Commission reviewed evidence presented by the public and the judiciary on the problem and offered a modest adjustment.

On the other hand, we are struck by the lack of any demonstrated evidence for a number of the proposed enhancements the Commission contemplates submitting to Congress. We cannot find justifications for these increases laid out in the proposed amendments or in the issues for comment. Nor did we get any sense from the public hearing held on March 14 that enhancements were necessary; quite the opposite in fact. While we support any effort to mitigate the lengthy sentences made possible by the guidelines in this area, we repeat our request, and that of others,[1] for a substantive review and overhaul of the guidelines that govern white collar sentencing. Given that neither Congress nor the Department of Justice can provide any evidence that these guidelines have failed to provide sufficient punishment, we also urge the Commission to eschew enhancements.

[1] Besides FAMM, the Federal Public and Community Defenders, the Practitioners' Advisory Group, the Washington Legal Foundation, the Constitution Project, and the American Bar Association all urged a comprehensive review of the guidelines in this area. Their letters are collected at UNITED STATES SENTENCING COMMISSION, PUBLIC COMMENT (Aug. 26, 2011), available at: http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20110826/index.cfm.

The government urged the Commission to adopt a variety of enhancements in insider trading, other securities and mortgage fraud cases. The Department offered no evidence of the need for these enhancements, save warnings of what could happen, and one quote from Judge Richard J. Sullivan, which to our reading is not a ringing endorsement of the need to add more enhancements.[2] The Department's sole contribution to the mitigation discussion is a safety valve, which, while a step in the right direction is both complex and miserly. For example, it bars relief to people involved in insider trading cases and anyone who directly or indirectly gained from the offense.

We echo Commissioner Beryl Howell's question to Deputy Assistant Attorney General John Buretta at the March 12, 2012 hearing to consider these proposed amendments. Following his testimony she asked "is there really a problem?" She requested cases the Department could point to showing that the sentences currently at their disposal are insufficient. Mr. Buretta offered some hypothetical justifications to support the DOJ's contention that sentences for these crimes are so low that the Commission has to add additional enhancements. Mr. Buretta had to agree with Judge Howell's summary of the Department's position: "Bottom line, you can't point to any cases. [This is just a] plan for the future."[3]

The guidelines cannot be based on supposition or fear of the future. Rather, the guidelines should be amended when the data and evidence demonstrate the need. Otherwise, they risk irrelevance.

The enhancement sought in the insider trading context illustrates our concern.

To the extent that a guideline cannot differentiate between more and less culpable defendants, and given the excessively lengthy sentences the economic crime guidelines too often call for, we urge the Commission to examine whether a downward adjustment might be the better answer. An exchange between Commissioner Ketanji Brown Jackson and Mr. Buretta on March 14 illustrates the point. They were discussing the Department's request for an "organized scheme" enhancement in lieu of the Commission's suggested sophisticated means enhancement. Mr. Buretta explained that an "unorganized" scheme, as it were, might be a rather unsophisticated one where the tipper comes into privileged information and passes it on to a relative. Such a breach does not rise to the level of the kinds of organized operations that have been the hallmark of the many successful prosecutions in the Southern District of New York.

Given that the guidelines already recognize insider trading as "a sophisticated fraud,"[4] rather than provide an enhancement in such a situation for organized insider traders, the guidelines could include a downward adjustment or an invited downward departure for the casual inside trader. The baseline guidelines seems to be working in the Southern District which has the most

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[2] Letter from Jonathan J. Wroblewski to the Honorable Patti B. Saris 4-5 (March 12, 2012).
[3] This problem of no evidence permeated the March 14 hearing. Amy Pope could point to only one case (which by the way resulted in a significant sentence) to support enhancements for individuals allegedly involved in human rights violations overseas who lie on immigration applications;
[4] U.S.S.G. § 2B1.4 cmt.

insider trading cases in the country and seems to have little trouble putting away serious insider traders. For example, 24 insider traders were sentenced in that district in 2011 and some yielded the highest sentences ever seen, including ten years for Zvi Goffer and 11 years for Raj Rajaratnam.[5] Of the 24 cases, four involved substantial assistance. Of the remaining 20, one defendant received supervised release; two received community confinement average 3.5 months, the remaining 17 received sentences averaging 44.1 months in prison.[6] Even removing the outlier cases (one at 120 and one at 132 months and a third at 6 months) the sentences still average 35.2 months. We could find no government appeals of any of these sentences.

While it is not possible to determine from the Insider Trading report how many of the sentences that varied from the guidelines enjoyed the support of the Probation Department or the government, we know from our analysis of the treatment of insider trading cases in the Southern District in 2009, that the government can acquiesce to below guideline sentences in ways that mask its role.

FAMM took a close look at the sentences in thirteen cases identified in that year's Morrison Foerster insider trading review,[7] where judges imposed punishment lower than called for in the guidelines, to tease out what happened and learn what moved the court to impose a below guideline sentence. We reviewed pleadings and sentencing transcripts.

We learned that:

- In five of the 13 cases, the government sought a downward departure to reward the assistance provided to the government in the investigation and/or prosecution of others. In one other case, prosecuted in both Canada and the United States, the defendants cooperated extensively with Canadian authorities and pled guilty in the United States case.
- In three of the remaining eight cases, the probation officer recommended a below guideline sentence, notwithstanding the calculated guideline range.
- In seven of the eight remaining cases, the government did not object to the below guideline sentence when given the opportunity to do so by the judge. In the eighth case, when asked, the prosecutor reiterated his position that the guideline sentence was appropriate but did not further object to the sentence when given the opportunity or raise additional arguments.
- In two of the eight cases, the government issued a press release hailing the sentence.

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[5] Morrison Foerster, *Insider Trading Annual Review: 2011*, 10 (Feb. 2012) ("Insider Trading"), *available at* http://www.mofo.com/files/Uploads/Images/2011-Insider-Trading-Review.pdf. .

[6] Analysis done based on information provided by Insider Trading at 18, Appendix A.

[7] Morrison Foerster, *Insider Trading: 2009 Review* (Feb. 10, 2010), available at: http://www.mofo.com/files/Publication/b7c9f5bd-bc1a-4e8e-9254-9187c9788123/Presentation/PublicationAttachment/cdc74a8f-e2c5-48c8-a637-bfa37480fa85/100218InsiderTrading.pdf.

- In one of the eight cases, the government pointed to the "just below guideline sentence" approvingly in court documents filed in another of the cases.
- In none of the cases did the government appeal the below guideline sentence.[8]

In other words, what passes for a lenient sentence can be a sentence urged by probation or one urged or acquiesced in by the government.

In that light, the insider trading proposed enhancements have a curious pedigree. Last year, U.S. Attorney Preet Bharara testified before the Commission and asked it to fashion tougher sentences for insider trading offenses.[9] The guidelines were letting some defendants off with "lighter sentences than they deserved."[10] He did so despite his office's successes, its passive role with respect to the variance, and failure to appeal. In his testimony, he also acknowledged that judges had been varying from the sentences recommended in this area but nonetheless urged the additional enhancements. As the authors of the 2011 annual insider trading case wrap up put it, Mr. Bharara sought the enhancements in spite of a clear message from the judiciary that the sentences are already too long:

> Federal judges sentencing insider traders continue to send the clear, consistent message that the Guidelines for insider trading offenses are unreasonably harsh and do not necessarily provide an appropriate basis for rendering fair sentences in insider trading cases. In sentencing [Winifred] Jiau to 48 months in prison – when she faced between 97 and 121 months – Judge [Saul] Rakoff noted, "There's no way I'm going to impose a guidelines sentence in this case . . . . The guidelines give the mirage of something that can be obtained with arithmetic certainty."[11]

We urge the Commission to insist on evidence of real need before adopting additional enhancement in this (or any area) of the guidelines where sentences have increased so dramatically, judges and others are urging an overhaul, and the government itself is unable to support the request with demonstrated need.

We support minimizing the impact of the loss and victims tables and/or the combination of the two. We think your proposals, while modest, reflect an effort to better account for whether and to what extent a defendant enjoyed monetary gain and attempts to unravel some of the double counting found in the guideline that mask blameworthiness. The solutions are beneficial but leave a number of issues unresolved. For example, with respect to the gain based solutions, the caps that the Commission prosposes are so high that they can be of relatively limited use. This is particularly so where the amount of loss even adjusted for gain has little to do with a

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[88] FAMM, Reuters Summary 2010 (on file with author).
[9] Transcript of Public Hearing before the United States Sentencing Commission 12 (Feb. 16, 2011). He faced some of the same kinds of questions from the commission that Mr. Buretta a year later.
[10] *Id.*
[11] Insider Trading 2011 at 11.

defendant's personal culpability. Problems with charging low-level conspirators with the entire loss in a major operation mirror those of low-level drug defendants caught up in major drug trafficking operations; while capping sentences based on very low levels of gain means that defendants whose gain minimally exceeds the gain thresholds are held accountable as severely as principals who make the real gains. And, while we appreciate the benefit to no-gain defendants that your proposal promises, the initial measure remains unduly high and the Commission has not provided guidance regarding the many ways gain can be calculated that might undermine your objective.

The complexity of the issues presented and the many questions and concerns raised at the hearing suggest that proposals offered by the PAG and the Defenders for encouraged downward departures, or the NYCDL for a robust downward adjustment based on role, real as opposed to alleged gain/loss and/or intent, would be a more meaningful way to address the overbearing role of the loss table on sentences in this area.

We support the Commission's proposal to limit the impact of the victim table by providing that the multi-level 4 and 6 level enhancements should not be applied in certain cases and encourage the Commission to refine the definition of victim, limiting it to victims who actually suffer financial harm as a result of the defendant's crime.

Finally, we reiterate that this area requires a significant overhaul and so hesitate to suggest additional targeted reductions. That said, given the relative success of the safety valve in drug cases (and the Commission's interest in promoting its more robust application, including within the guidelines), we would encourage the Commission to consider a robust economic crimes safety valve that would give judges an additional tool for reducing sentences in this area when the guidelines overreach.

2. Drugs

FAMM supports the extension of the guideline safety valve as proposed by the Commission to precursor chemicals. There is no reason to deny the adjustment to qualifying defendants and it appears that the proposal is not opposed by the Department. There are very few of these cases. In 2010, only 236 cases were brought.[12] This number is dwarfed by the 22,922 cases under U.S.S.G. § 2D1.1, of which 8,562 received safety valve reductions.[13] We appreciate the proposed extension but, as we have urged many times before, we hope the Commission does more than extend the relief to these cases.[14] The drug safety valve has provided important, if limited relief and ought to be available to defendants in Criminal History Categories II and III and in cases where judges have departed because the defendant's criminal history calculation overstate the seriousness of their criminal history. It should also be extended to other kinds of crimes, including as discussed above, albeit adjusted accordingly.

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[12] UNITED STATES SENTENCING COMMISSION, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS FISCAL YEAR 2010, 29.
[13] *Id.* at 26.
[14] *See, e.g.,* Letter from Mary Price and Julie Stewart to the Honorable Patti B. Saris 2-3 (Aug. 26, 2011).

8. Multiple Counts

The Commission proposes resolving a circuit split regarding the impact of a mandatory minimum on sentences other than those subject to the mandatory minimum when a defendant is facing sentencing for multiple counts. We do not support adopting the Fifth Circuit's approach in these cases and encourage the Commission to follow instead the Ninth and D.C. Circuit approaches.

We first note that the Commission provides no evidence or justification for making the change. The synopsis merely states that it will adopt the Fifth Circuit approach. It does not explain why that approach is superior, once again leaving us to wonder, where's your evidence?

A mandatory minimum, while governing the sentence for the particular offense of conviction to which it applies, displaces as it were the guideline sentence for that particular offense. Mandatory minimums do not displace sentences for other offenses and we can see no reason why the Commission would upset the practice of courts in calculating the guideline sentence, considering departures and variances based on 18 U.S.C. § 3553(a) and imposing a sentence sufficient but no greater than necessary to punish those counts. Non-mandatory minimum bearing counts are not subject to the mandatory minimum and should not be punished as though they were.

We see the imposition of the mandatory minimum on all counts as unduly complex and resulting in anomalies, such as when the mandatory minimum for one count exceeds the statutory maximum for another. The proposed amendment attempts to address the problem the amendment created with a complicated logarithm of sorts in the proposed application note followed by a special rule for resentencing. These are bound to create confusion and litigation, both of which are wholly unnecessary.

We appreciate that at the end of the day, the defendant will receive the mandatory minimum sentence when it exceeds that of the other counts. However, relieving the court of the task of arriving at the appropriate sentence for other counts deprives stakeholders the opportunity to learn what the court's assessment of the appropriate sentence for such counts. It denies the Commission the feedback the Commission deserves on the appropriateness of a given sentence and it denies the defendant the individualized consideration the advisory guidelines should guarantee.

We berate mandatory minimums for their one-size-fits-all coverage and cookie cutter approach. They demean defendants and they strip judges of judgment. We can see no reason for the Commission to permit them to infect the sentencing for other counts and urge the Commission to resolve the conflict in favor of individualized consideration.

9. Rehabilitation

FAMM supports Option 1, the elimination of the ban on consideration of post-sentencing rehabilitation in light of the Supreme Court's opinion in *Pepper v. United States*, 131 S. Ct. 1229 (2011), a case in which FAMM participated with an amicus brief. Excising the bar at § 5K2.19 will honor the decision, while avoiding the complexity and uncertainty certain to attend Option 2. Option 2 is also very likely to be restrictive in ways that will invite variances from sentencing courts and the Commission's various examples are unlikely to cover all the potential ways a defendant may exhibit rehabilitation. Option 2 would perpetuate the dissonance between the limited departure authority in the guidelines and the comprehensive commands in 18 U.S.C. § 3553(a). Just such dissonance was resolved in favor of the statue in *Pepper*.

We hope the Commission will craft guidelines cognizant of the needs of sentencing courts for simple guidance based on case law. The Commission should instruct courts simply to consider whether a departure is warranted in the given case in light of a defendant's rehabilitation.

Conclusion

We thank the Commission, as always, for considering our views, and we welcome your questions and further discussion.

Sincerely,

Julie Stewart
President

Mary Price
Vice President and General Counsel